S VIGNESWARAN M SANASEE A

v.

MAJU INSTITUTE OF EDUCATIONAL DEVELOPMENT (MIED) (NO 2) B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[ORIGINATING SUMMONS NO: D-24NCC-8-2010]
3 AUGUST 2010 C

COMPANY LAW: *Derivative action - Application for leave to bring action on behalf of defendant company - Suit against trustees of defendant - Serious allegations of wrongdoings - Basis of allegations - Locus standi of applicant - Compliance with procedural requirements - Good faith of applicant - Legitimate expectation of applicant - Alleged wrongdoers in control of Board of Trustees - Defendant afforded opportunity to recover monies lost by way of action - Companies Act 1965, s. 181A(1), (4)(a), s. 181B(1), s. 181E* D

CIVIL PROCEDURE: *Action - Derivative action - Application for leave to bring action on behalf of defendant company - Suit against trustees of defendant - Serious allegations of wrongdoings - Basis of allegations - Locus standi of applicant - Compliance with procedural requirements - Good faith of application - Legitimate expectation of applicant - Alleged wrongdoers in control of Board of Trustees - Defendant afforded opportunity to recover monies lost by way of action - Companies Act 1965, s. 181A(1), (4)(a), s. 181B(1), s. 181E* E F

The plaintiff sought leave of the court to bring a derivative action on behalf of the defendant public company, Maju Institute of Educational Development (MIED), the educational arm of the Malaysian Indian Congress political party, against the defendant's trustees and other wrongdoers pursuant to s. 181A(1) and s. 181B(1) of the Companies Act 1965 ('the Companies Act'). The plaintiff made serious allegations against the trustees for various breaches of duties, obligations and negligence. Amongst them were: (1) that the defendant was practically run by the Chairman of the Board of Trustees without any supervision or consultation with the trustees or members; (2) that the defendant was run by the Chairman as a 'one-man show'; (3) that the Chairman was in sole control of the defendant's operations since its formation in G H I

A 1984; (4) that the Chairman held his position since the defendant's incorporation although art. 12 of the defendant's articles of association provided that the first Chairman shall only be Chairman or be rotated for a period of three years from the date of the defendant's incorporation. The trustees denied the
B allegations.

Held (allowing the application with costs):

(1) The law was clear that in an application such as the present case, it was not for the court to go into the details of the
C allegations or the merits of the complaints at the leave stage (*YAM Tuanku Dato' Seri Nadzaruddin ibni Tuanku Jaafar v. Datuk Bandar Kuala Lumpur; Tang Kwor Ham and Others v. Pengurusan Danaharta Tanah Nasional Bhd and Others; Tuan Haji Sarip Hamid and Anor v. Patco (M) Bhd; R v. Secretary of State*
D *for the Home Department, ex p Rukshanda Begum*; refd). (paras 6.1 & 6.2)

(2) The plaintiff as a member of the defendant had *locus standi* to bring the instant application by virtue of s. 181A (4)(a) of the
E Companies Act. The plaintiff, being the only member bringing the present case, was entitled to do so as there was no requirement for a derivative action to be commenced by two or more members of a company. The plaintiff had also complied with the procedural requirement under s. 181B(2) to
F give 30 days' notice in writing to the trustees of his intention to apply for the leave of the court. (paras 6.3, 6.4 & 6.5)

(3) The plaintiff's complaints were not without basis or substance. It was an admitted fact that the defendant suffered serious
G financial losses due to the misconduct or misfeasance of its former Chief Executive Officer ('CEO'). Due to the alleged wrongdoings of that CEO, the defendant commenced both civil and criminal proceedings against her. The success or failure of the criminal prosecution or civil claim by the defendant against
H that CEO was not a matter for this court to consider. Similarly, the success or failure of the plaintiff's claim against the trustees in its writ of summons and statement of claim after the grant of leave was not for the court to decide at this stage. (paras 6.7)

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(4) On whether the plaintiff had a collateral purpose in filing the action to help the CEO, there was no evidence adduced in the defendant's affidavits to link the plaintiff to the CEO in the alleged misappropriation of RM3.5 by the CEO. (para 6.8)

(5) Good faith should be decided according to the facts of each case. It was established that in an arguable case, the applicant could not be said to be acting in bad faith just because he wanted the company to pursue what he genuinely considered to be a valid claim. Also, an applicant advancing self-interest was not necessarily acting in bad faith (*Primex Investments Ltd v. Northwest Sports Enterprise Ltd*; refd.) The plaintiff as a member of the defendant public company incorporated for a benevolent purpose had a legitimate expectation that the defendant would be managed properly in accordance with the law for the benefit of the Indian community who were the beneficiaries of the defendant. The plaintiff could legitimately expect the trustees to manage the defendant in accordance with law and procedure. The issue of legitimate expectation was a question of law to be decided objectively at trial. It would suffice for the present that the plaintiff averred that his legitimate expectation had been adversely affected by the alleged wrongdoings of the trustees. (paras 6.9 & 6.10)

(6) From the affidavit evidence it was clear that the Board of Trustees did not discuss the plaintiff's application at either of the Annual General Meetings held on 18 January 2010 or 31 March 2010. No resolution was passed on whether the defendant should take legal action against the negligent trustees and other wrongdoers. Further, there was no evidence to show that a resolution was passed by the Board of Trustees to oppose the plaintiff's application for leave. It appeared that the defendant was opposing the plaintiff's leave application simply because the alleged wrongdoers were in control of the defendant. The defendant too was unable to sue due to that reason thereof. (para 6.11)

(7) The defendant had not held its Annual General Meeting for many years. Section 143 of the Companies Act provided that a general meeting of a company must be held annually. As a matter of fact, the AGMs for 2008 and 2009 were only held after the plaintiff filed the application for leave. The defendant, in fact, failed to table accounts annually for the years 2005 to

A 2008. Those were important and significant years as it was during that period that the CEO was alleged to have misappropriated funds from the defendant. (para 6.14)

(8) With leave granted to the plaintiff, the plaintiff would be in a B position to file a claim against the alleged wrongdoers. The civil suit would afford the defendant an opportunity to recover monies lost through the negligence and/or breaches of fiduciary duties and obligations of the trustees. In doing so, the corporate governance of the defendant would improve and the C confidence of the Indian community restored over the financial operations and management of the defendant. (para 6.15)

(9) The defendant's complaints that the plaintiff was using the proceedings as a political platform to attack the Malaysian Indian Congress were unjustified and unsupported by D evidence. The allegations remained mere contentions. The fact that the plaintiff was a former politician and a member of the Malaysian Indian Congress should not deprive him as a member of the defendant of his right to commence the present case. (para 6.17)

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Case(s) referred to:

Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors [1995] 4 CLJ 551 CA ***(refd)***

Ismail Mohamad v. Wan Khairani Wan Mahmood & Another Appeal [2009] 4 CLJ 653 FC ***(refd)*** F

Mohd Shuaib Ishak v. Celcom (Malaysia) Berhad [2008] 1 LNS 314 HC ***(refd)***

Primex Investments Ltd v. Northwest Sports Enterprise Ltd [1995] Can Lll 717 ***(refd)***

R v. Secretary of State for the Home Department, ex p Rukshanda Begum G *[1990] COD 107* ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tuan Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 3 CLJ 627 SC ***(refd)***

YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar H *Kuala Lumpur & Anor [2003] 1 CLJ 210 HC* ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 129(1), 143, 181A(1), (4)(a), 181B(1), (2), (4)(a), (b), 181E

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For the plaintiff - Vasanthi Arumugam; M/s Vas & Co
For the defendant - Chetan Jethwani (Intan Azlina Mazlan with her); M/s Kumar & Partnership

Reported by Usha Thiagarajah

JUDGMENT

Mah Weng Kwai JC:

[1] The plaintiff by his originating summons sought to obtain leave to bring an action on behalf of Maju Institute of Educational Development (MIED), the defendant against its trustees and other wrongdoers pursuant to s. 181A(1) and s. 181B(1) of the Companies Act 1965 (the Act).

[2] The new s. 181A of the Act which came into force on 15 August 2007 under the Companies (Amendment) Act 2007 allows a complainant to apply to the court for leave to bring an action on behalf of a company by way of a derivative action against the alleged wrongdoers.

[3] The Plaintiff's Case

3.1. The defendant is a public company limited by guarantee and incorporated as the educational arm of the political party known as the Malaysian Indian Congress. The defendant is funded by and operates through government grants, donations and charitable loans. The defendant is a charitable and a non-profit making trust. The beneficiaries are the Indian community in Malaysia.

3.2. The defendant is managed by a Board of Trustees (formerly known as the Board of Directors).

3.3. The plaintiff is a member of the defendant.

3.4. The chairman of the Board of Trustees of the defendant since its incorporation in 1984 till to date is Dato' Sri Samy Vellu s/o Sangalimuthu, who is also the President of the Malaysian Indian Congress.

A 3.5. The plaintiff's grounds to obtain leave to commence legal proceedings against the trustees and other wrongdoers are *inter alia*:

(i) the trustees have committed serious mismanagement of the defendant, misappropriation of funds, breaches of fiduciary duties, breaches of trust, breaches of statutory duties, breaches of company law and negligence;

(ii) as a result of the various breaches, the defendant had suffered serious financial losses;

(iii) specific allegations made by the plaintiff against the trustees are *inter alia*:

a) the trustees have been negligent and/or reckless in allowing Chithirakala a/p Palanisamy (Chithirakala) the former Chief Executive Officer of the Defendant to commit the alleged misappropriation of funds of the defendant;

b) the trustees have knowingly disbursed personal loans to persons in contravention of the Act and the Defendant's Memorandum and Articles of Association;

c) the trustees have knowingly appointed a fellow trustee to a salaried position in the defendant in contravention of the Defendant's Memorandum of Association;

d) the trustees have mismanaged the defendant by:

– not holding General Meetings annually;

– not tabling accounts annually;

– allowing the Chairman of the Board of Trustees to run the Defendant without accountability;

– awarding contracts without following the procedure for public tenders;

– allowing the Chairman of the Board of Trustees to award contracts to his family and friends;

– allowing the Chairman of the Board and Chithirakala to withdraw monies for their personal use. A

e) the trustees have granted educational loans and have been charging interest thereon unlawfully.

3.6. The defendant had on 31 July 2009 filed a civil claim in the Kuala Lumpur High Court *vide* Suit No: D-22-1189-2009 against Chithirakala and eight others to recover monies allegedly misappropriated from the defendant. B

3.7. The plaintiff has nothing to gain from the filing of this application for leave and that his only interest in the matter is to prevent the defendant from suffering further financial losses and to check the action of the wrongdoers. C

3.8. Further allegations of wrongdoings against the trustees are that: D

a) the trustees have breached the fiduciary obligations to the defendant in allowing the defendant to provide loans to students and to charge interest thereon instead of granting scholarships to students; E

b) the trustees have been negligent and/or reckless in the management of the defendant as a result of which the defendant has been compelled to file the civil suit against Chithirakala and others for the recovery of the misappropriated funds; F

c) several trustees had acted negligently and/or in breach of their fiduciary duties in the award of contracts in relation to the construction and management of AIMST University; G

d) the trustees have breached their fiduciary duties to the defendant in allowing unlawful payment of funds from the accounts of the defendant and of MIED Capital Sdn Bhd, a wholly owned subsidiary of the defendant; H

e) the trustees have made an unlawful payment of RM350,000 to one of the trustees Tan Sri Vadiveloo a/l Govindasamy; I

f) the trustees have allowed personal loans that are unlawful;

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g) the Chairman of the Board of Trustees has fraudulently approved a scheme for the unjust enrichment of Tamil Nesan Sdn Bhd, a company owned by the Chairman; and

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h) the trustees have breached the fiduciary obligations and duties to the defendant and to the beneficiaries of the defendant thereby causing concern and fear of further financial losses to the defendant and to the Indian community.

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The plaintiff sought the leave of court to commence legal proceedings in the name of the defendant against the trustees as the defendant was under the control of the trustees themselves.

[4] The Defendant's Case

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The Defendant submits that the application for leave to commence proceedings in the name of the defendant under s. 181A of the Act ought not be granted for the following reasons:

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4.1. The plaintiff has not given the trustees 30 days' notice of his intention to apply for leave;

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4.2. The plaintiff is attempting to take advantage of the proceedings to revive his political career having ended his term of office as the Youth Chief and Central Working Committee Member of the Malaysian Indian Congress and after his defeat in the 2008 General Election. The plaintiff is attempting to use these proceedings as a political platform to attack the Malaysian Indian Congress. The plaintiff's application is made in bad faith as a political gesture to further the plaintiff's personal ambitions and to embarrass the Chairman of the Board who is the President of the Malaysian Indian Congress rather than in the interests of the defendant;

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4.3. The plaintiff's several allegations have already been addressed by the defendant by taking steps to remedy the complaints;

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4.4. The subject matter of the several complaints by the plaintiff have caused Chithirakala to be prosecuted for various offences and to be sued in the Kuala Lumpur High Court for the recovery of misappropriated funds;

4.5. The defendant fears that if leave is granted to the plaintiff, the ensuing proceedings may be used for the benefit of Chithirakala and may damage the defendant's ability to prosecute her;

4.6. The grant of leave would hamper the ability of the Board of Trustees in the management and conduct of the defendant's affairs to the detriment of the defendant;

4.7. The Memorandum of Association of the defendant allows the defendant to grant scholarships but this does not mean, from the words of art. 3(A) of the Memorandum of Association, that the defendant cannot grant study loans and to charge interest thereon;

4.8. While there has been misconduct in the financial affairs of the defendant by Chithirakala, such wrongdoings cannot be attributed to the trustees. As a matter of fact the trustees on discovering the wrongdoings had taken immediate civil and criminal action against her. The defendant's action clearly shows that the trustees have taken the necessary action to protect the interest of the defendant. It should be noted that the grounds of complaint against the defendant are based on the alleged wrongdoings by Chithirakala;

4.9. The defendant denies that there was anything improper in the award of the various contracts in the construction of AIMST University. The contracts were awarded after consultation with the defendant's consultant, Messrs TMI Nusantara Sdn Bhd was were the Project Managers. The allegation of excessive costs in the construction of the university is without basis as the final cost of construction was RM506 million whereas the preliminary cost estimate in 2001 was RM584 million;

4.10. The allegation of withdrawal of funds from MIED Capital Sdn Bhd although a wholly-owned subsidiary of the defendant cannot be attributed to the trustees as MIED Capital Sdn Bhd is a separate company and has a separate legal entity;

4.11. The payment of the sum of RM350,000 to the trustee, Tan Sri Vadiveloo a/l Govindarsamy was payment towards his professional services for advice regarding the transfer of land to the defendant. Further the payment of RM4,000 per month to Tan Sri Vadiveloo a/l Govindarsamy was reimbursement for his services and frequent visits to TAFE College in Seremban. The defendant contends that these payments are expressly allowed as an exception to cl. 5 of the Memorandum of Association of the defendant;

4.12. The relationship between the Chairman of the Board of trustees and Tamil Nesan Sdn Bhd was not declared to the Board of Trustees as the trustees have knowledge of the relationship. Further, payment to Tamil Nesan Sdn Bhd was for services rendered and which was approved by Chithirakala;

4.13. On the allegation of unlawful personal loans being made to Chithirakala, the defendant's explanation is that the sum of RM3.5 million was stolen by Chithirakala and was not loaned to her. There was no loan to Tan Sri Hari Narayanan and the repayment of the loan to Mumtaz Begum is being deducted from her monthly salary;

4.14. On the allegation of breaches of statutory duties, the defendant on the direction of the Companies Commission of Malaysia held its Annual General Meeting for 2008 and 2009 on 30 April 2010;

4.15. The allegation of breach of s. 129(1) of the Act has been superseded by the election of the new trustees at the Annual General Meeting held on 21 March 2010 and any irregularity complained of by the plaintiff have been rectified by the members at the Annual General Meeting;

4.16. The plaintiff's allegations of fraud and conspiracy to injure cannot be maintained as they are not substantiated with particulars;

4.17. The reliefs sought by the plaintiff in this application for leave are too wide. Prayer (d) which seeks discovery from the defendant would in effect give the plaintiff complete access to the affairs of the defendant and its subsidiaries and by prayers (e) and (f) the plaintiff seeks unrestricted

access to the officers and professional advisors of the defendant. The plaintiff should not be allowed such wide ranging access as the information obtained may not be kept confidential by the plaintiff and as the defendant is taking legal action against Chithirakala, the disclosure of such information may affect the defendant's claim against her; and

4.18. The plaintiff's application for costs in the sum of RM200,000 to finance the proposed legal proceedings is unreasonable. The defendant ought not to be made to bear the costs of the plaintiff when the intended claim by the plaintiff is based on the evidence of the true wrongdoer, Chithirakala.

[5] Decision Of The Court

Upon reading the originating summons and the relevant affidavits and upon a consideration of the written submissions by counsel for both parties, I held that this was a fit and proper case for the court to grant leave to the plaintiff to commence a derivative action in the name of the defendant against the 9 trustees as cited in the proposed writ of summons and statement of claim attached to the originating summons. In particular, the court granted an order in terms of prayers 1, 2 (a) (b) (c), 4 and 5. For prayer 1(d) the plaintiff was granted leave to file for discovery, if deemed necessary. No order was made on prayer 1(e) while the plaintiff was granted leave to apply if necessary on prayers 1(f) (g) and (h). The plaintiff's application was allowed with costs in the cause.

[6] Reasons For Decision

6.1. Serious allegations have been made by the plaintiff against the trustees for various breaches of duties and obligations and negligence. The trustees have in turn denied each and every allegation made by the plaintiff. The law is clear that, in an application for leave such as this, it is not for the court to go into the details of the allegations or the merits of the complaints at the leave stage.

6.2. In the case of *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur* [2003] 1 CLJ 210 Ramli Ali J (now JCA) held that the duty of the Court at the leave application stage was not to go into the matter

in great depths. This principle was reiterated by Gopal Sri Ram JCA (as he then was) in the Court of Appeal in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 when the learned judge held that the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. All that is required for the applicant to show is that there is some substance in the grounds supporting the application. Counsel for the defendant himself has no quarrel with the legal principle as stated in the Supreme Court case of *Tuan Sarip Hamid & Anor v. Patco (Malaysia) Berhad* [1995] 3 CLJ 627 which referred to the case of *R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 where the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:

> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
>
> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
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> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, … namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

6.3. The plaintiff as a member of the defendant has *locus standi* to bring this application by virtue of s. 181A (4)(a) which provides that for the purposes of ss. 181A, 181B and 181E a complainant means a member of a company or a person who is entitled to be registered as a member of a company.

6.4. Although the plaintiff is the only member bringing this action, he is quite entitled to do so as there is no requirement for a derivative action to be commenced by two or more members of a company. In the Federal Court case of *Ismail Mohamad v. Wan Khairani Wan Mahmood & Another Appeal* [2009] 4 CLJ 653 the learned Chief Justice Zaki Tun Azmi held that:

> In my opinion, a derivative action is a derivative action. The number of shareholders is not material, whether there are two or more. A minority shareholder has the right to take a derivative action to protect the interest of a company.

6.5. The plaintiff has complied with the procedural requirement under s. 181B(2) to give 30 days' notice in writing to the trustees of his intention to apply for the leave of court under s. 181A. The plaintiff gave 30 days' notice in writing to the trustees by letter dated 10 December 2009 (see encl. 2 exh. VS38).

6.6. In deciding whether or not leave shall be granted, I took into account whether the plaintiff is acting in good faith as required under s. 181B(4)(a). Section 181B(4)(b) further states that in deciding whether or not leave shall be granted by the court, the court shall take into account whether it appears *prima facie* to be in the best interest of the company that the application for leave be granted. In the case of *Mohd Shuaib Ishak v. Celcom (Malaysia) Berhad* [2008] 1 LNS 314, Ramly Ali J (now JCA) expressed the view that s. 181B(4) would be satisfied as long as the complainant could demonstrate "that there was a reasonable basis for the complaint and the proposed action was legitimate and arguable, in that it has some semblance of merit". The court emphasized too that at the leave stage which is the threshold stage, the court is not to go into

A the merits of the substantial issues and all that the plaintiff had to show was that there was some substance in the grounds supporting the application.

6.7. In the present case, the complaints by the plaintiff are not B without basis or substance. It is an admitted fact that the defendant has suffered serious financial losses due to the misconduct or misfeasance of its former Chief Executive Officer Chithirakala. Owing to the alleged wrongdoings of Chithirakala, the defendant has commenced both civil and C criminal proceedings against her. Whether the criminal prosecution of Chithirakala or the civil claim by the defendant against Chithirakala will be successful eventually is not for this Court to consider. Similarly whether or not the claim of the plaintiff against the trustees in its writ of D summons and statement of claim after leave has been granted will be successful is not for the court to decide at this stage. In the case of *Mohd Shuaib Ishak (supra)*, Ramly Ali J (now JCA) succinctly explained the test to be adopted by the court at the leave application stage in the following E terms:

> It is to be stressed that at this stage the threshold requirement or guiding principles for leave to bring an action on behalf of the company under Section 181A of the Companies Act 1965 should not be narrowed down to F an extreme edge so as not to impose or place an undue burden or shackles on the Plaintiff to such an extent that it may eventually frustrate the object of the procedural rules for seeking leave.

6.8. The plaintiff in this case has contended that he is bringing G this action in good faith and in the interest and for the benefit of the defendant. The plaintiff has declared that he derives no personal benefit from this application nor has he any collateral purpose in doing so. The plaintiff has denied the contention of the trustees that he has a collateral H purpose in filing this action to help Chithirakala. It appears that the plaintiff is not in anyway involved in the alleged misappropriation of RM3.5 million by Chithirakala as there has been no evidence adduced in the defendant's affidavits to link the plaintiff to Chithirakala.

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6.9. Good faith should be decided according to the facts of each case. In *Primex Investments Ltd v. Northwest Sports Enterprise Ltd* [1995] Can Lll 717 (BCSC) Justice Tysoe of the Supreme Court of British Columbia held that "where there is an arguable case, the applicant cannot be said to be acting in bad faith because he wants the company to pursue what he genuinely considers to be a valid claim" and that "an applicant advancing self-interest is not necessarily acting in bad faith."

6.10. The plaintiff as a member of the defendant which is a public company incorporated for a benevolent purpose, has a legitimate expectation that the defendant will be managed properly and in accordance with the law for the benefit of the Indian community who are the beneficiaries of the defendant. The plaintiff can legitimately expect the trustees to manage the defendant in accordance with law and procedure. The issue of legitimate expectation is a question of law to be decided objectively at trial. It will suffice for the present for the plaintiff to aver that his legitimate expectation has been adversely affected by the alleged wrongdoings of the trustees.

6.11. *Prima facie*, the plaintiff's application for leave is in the best interest of the defendant. From the affidavit evidence it is clear that the Board of Trustees did not discuss the plaintiff's application at either of the Annual General Meetings held on 18 January 2010 or 31 March 2010. It will be noted that no resolution was passed on whether the defendant should take legal action against the negligent trustees and other wrongdoers. Further there is no evidence to show that a resolution was passed by the Board of Trustees to oppose the plaintiff's application for leave. On the contrary it would appear that the defendant is opposing the plaintiff's leave application simply because the alleged wrongdoers are in control of the defendant.

6.12. The plaintiff contended that the defendant was practically being run solely by the Chairman of the Board of Trustees without any supervision or consultation with the trustees or members. The plaintiff in his affidavit evidence avers that the defendant is run by the Chairman of Board of Trustees as a "one man show" and that the Chairman is in sole

control of the operations of the defendant since the defendant was formed in 1984. Dato' Sri Samy Vellu a/l Sangalimuthu has been the Chairman of the Board of Trustees since incorporation although Article 12 of the Defendant's Articles of Association provides only that the first Chairman shall not retire or be rotated for a period of three years from the date of incorporation.

6.13. On the commencement of a derivative action Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Abdul Rahim Aki & Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors* [1995] 4 CLJ 551 had this to say:

> ... **derivative action**; an ingenious procedural device created by courts of equity; by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants.

As stated earlier, the defendant is unable or cannot sue as the alleged wrongdoers are themselves in control of the Board of Trustees.

6.14. Section 143 of the Act provides that a general meeting of a company must be held annually. The defendant unfortunately has not held its Annual General Meeting for many years. As a matter of fact, the Annual General Meetings for 2008 and 2009 were only held after the plaintiff had filed the application for leave. The defendant has also failed to table accounts annually for the years 2005 to 2008. These were important and significant years as it was during this period that Chithirakala is alleged to have misappropriated funds from the defendant.

6.15. With a grant of leave to the plaintiff, the plaintiff will be in a position to file the proposed writ of summons and statement of claim, a copy of which is attached to the

originating summons. The civil suit will afford the defendant an opportunity to recover monies lost through the negligence and/or breaches of fiduciary duties and obligations of the trustees. In so doing the corporate governance of the defendant will be improved and hopefully the confidence of the Indian community will be restored over the financial operations and management of the defendant.

6.16. In order to ensure that the reliefs sought by the plaintiff in this application are not too wide, as submitted by counsel for the defendant the court only granted an order in terms of the prayers as referred to earlier in this judgment.

6.17. Lastly, I find that the complaints by the defendant that the plaintiff was using these proceedings as a political platform to attack the Malaysian Indian Congress to be unjustified and unsupported by evidence. The allegations remained mere contentions. In any event, I considered the fact that the plaintiff was a former politician and a member of the Malaysian Indian Congress should not deprive him as a member of the defendant, of his right to commence this action.

[7] In the result, the plaintiff's application was allowed with costs.